

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CYRUS G. MURPHY,)	
)	No. CV-07-0214-JPH
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR FURTHER
MICHAEL J. ASTRUE,)	ADMINISTRATIVE PROCEEDINGS
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing on April 30, 2008. (Ct. Rec. 22, 18). Plaintiff Cyrus G. Murphy ("Plaintiff") filed a reply brief on April 21, 2008. (Ct. Rec. 24). Attorney Rebecca M. Coufal represents Plaintiff; Special Assistant United States Attorney Joanne E. Dantonio represents the Commissioner of Social Security ("Commissioner"). The parties have filed a consent to proceed before a magistrate judge. (Ct. Rec. 6). After hearing argument and reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 18) and remands for further administrative proceedings. Defendant's Motion for Summary Judgment (Ct. Rec. 22) is **DENIED**.

JURISDICTION

On April 28, 2004, Plaintiff filed applications for Supplemental Security Income ("SSI") benefits and Disability Insurance Benefits ("DIB"), alleging disability since February 28,

1 2001, due to cervical spondylosis, scoliosis, stress, back
2 problems, general muscle pain, depression and paralysis of muscles
3 used for breathing. (Administrative Record ("AR") 15, 58-61, 65,
4 74). Plaintiff later amended his alleged onset date to January
5 31, 2004. (AR 15, 618-621). Plaintiff's applications for SSI and
6 DIB were denied initially and on reconsideration.

7 On October 5, 2006, Plaintiff appeared before Administrative
8 Law Judge ("ALJ") Mary B. Reed, at which time testimony was taken
9 from Plaintiff and vocational expert Tom Moreland. (AR 566-628).

10 On March 13, 2007, the ALJ issued a decision finding that

11 Plaintiff was not disabled. (AR 15-29). The Appeals Council
12 denied a request for review on May 30, 2007. (AR 7-9).

13 Therefore, the ALJ's decision became the final decision of the
14 Commissioner, which is appealable to the district court pursuant
15 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
16 review pursuant to 42 U.S.C. § 405(g) on July 5, 2007. (Ct. Rec.
17 1).

18 **STATEMENT OF FACTS**

19 The facts have been presented in the administrative hearing
20 transcript, the ALJ's decision, the briefs of both Plaintiff and
21 the Commissioner and will only be summarized here. Plaintiff was
22 43 years old on the date of the amended alleged onset of
23 disability, had obtained a high school education and completed one
24 year of college, and has past work experience as a
25 porcelain/enamel painter, truck driver, core rip operator and
26 material handler. (AR 28, 576-577, 616-618).

27 Plaintiff indicated that his impairments limited him to
28 standing and sitting no more than 2 hours, lifting no more than 20

1 pounds, and no excessive turning of his head and torso. (AR 74).
2 At the administrative hearing, Plaintiff testified that neck and
3 back pain interfered with his ability to work. (AR 587-590). He
4 also stated that he could lift only three pounds repetitively and
5 had problems grasping with his right hand. (AR 589-591). He
6 further mentioned difficulties with sleep and sleep apnea. (AR
7 603-605). Plaintiff testified that he is also anxious, gets
8 nervous in front of crowds, and gets agitated. (AR 610-611). He
9 noted that he stopped working due to a temporary lack of work.
10 (AR 75). Plaintiff explained that he was laid off. (AR 592).

11 SEQUENTIAL EVALUATION PROCESS

12 The Social Security Act (the "Act") defines "disability" as
13 the "inability to engage in any substantial gainful activity by
14 reason of any medically determinable physical or mental impairment
15 which can be expected to result in death or which has lasted or
16 can be expected to last for a continuous period of not less than
17 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
18 Act also provides that a Plaintiff shall be determined to be under
19 a disability only if his impairments are of such severity that
20 Plaintiff is not only unable to do his previous work but cannot,
21 considering Plaintiff's age, education and work experiences,
22 engage in any other substantial gainful work which exists in the
23 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
24 Thus, the definition of disability consists of both medical and
25 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
26 (9th Cir. 2001).

27 The Commissioner has established a five-step sequential
28 evaluation process for determining whether a person is disabled.

1 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
2 engaged in substantial gainful activities. If he is, benefits are
3 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
4 decision maker proceeds to step two, which determines whether
5 Plaintiff has a medically severe impairment or combination of
6 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

7 If Plaintiff does not have a severe impairment or combination
8 of impairments, the disability claim is denied. If the impairment
9 is severe, the evaluation proceeds to the third step, which
10 compares Plaintiff's impairment with a number of listed
11 impairments acknowledged by the Commissioner to be so severe as to
12 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
13 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
14 meets or equals one of the listed impairments, Plaintiff is
15 conclusively presumed to be disabled. If the impairment is not
16 one conclusively presumed to be disabling, the evaluation proceeds
17 to the fourth step, which determines whether the impairment
18 prevents Plaintiff from performing work he has performed in the
19 past. If Plaintiff is able to perform his previous work, he is
20 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
21 cannot perform this work, the fifth and final step in the process
22 determines whether Plaintiff is able to perform other work in the
23 national economy in view of his residual functional capacity and
24 his age, education and past work experience. 20 C.F.R. §§
25 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

26 The initial burden of proof rests upon Plaintiff to establish
27 a *prima facie* case of entitlement to disability benefits.
28 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*

1 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
2 met once Plaintiff establishes that a physical or mental
3 impairment prevents him from engaging in his previous occupation.
4 The burden then shifts to the Commissioner to show (1) that
5 Plaintiff can perform other substantial gainful activity and (2)
6 that a "significant number of jobs exist in the national economy"
7 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
8 (9th Cir. 1984).

9 **STANDARD OF REVIEW**

10 Congress has provided a limited scope of judicial review of a
11 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
12 the Commissioner's decision, made through an ALJ, when the
13 determination is not based on legal error and is supported by
14 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
15 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
16 1999). "The [Commissioner's] determination that a plaintiff is
17 not disabled will be upheld if the findings of fact are supported
18 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
19 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
20 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
21 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
22 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
23 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
24 573, 576 (9th Cir. 1988). Substantial evidence "means such
25 evidence as a reasonable mind might accept as adequate to support
26 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
27 (citations omitted). "[S]uch inferences and conclusions as the
28 [Commissioner] may reasonably draw from the evidence" will also be

1 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).

2 On review, the court considers the record as a whole, not just the
3 evidence supporting the decision of the Commissioner. *Weetman v.*
4 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
5 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

6 It is the role of the trier of fact, not this court, to
7 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
8 evidence supports more than one rational interpretation, the court
9 may not substitute its judgment for that of the Commissioner.
10 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
11 (9th Cir. 1984). Nevertheless, a decision supported by
12 substantial evidence will still be set aside if the proper legal
13 standards were not applied in weighing the evidence and making the
14 decision. *Browner v. Secretary of Health and Human Services*, 839
15 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
16 evidence to support the administrative findings, or if there is
17 conflicting evidence that will support a finding of either
18 disability or nondisability, the finding of the Commissioner is
19 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
20 1987).

21 ALJ'S FINDINGS

22 The ALJ found at step one that Plaintiff has not engaged in
23 substantial gainful activity since the amended date of alleged
24 onset of disability, January 31, 2004. (AR 17). At step two, the
25 ALJ determined that Plaintiff has obesity, degenerative disc
26 disease of the lumbar spine and hypertension, severe impairments,
27 but that he does not have an impairment or combination of
28 impairments listed in or medically equal to one of the Listings

1 impairments. (AR 17-23). The ALJ specifically concluded that
2 since the amended date of disability onset, January 31, 2004,
3 Plaintiff has not had a severe mental impairment diagnosed by an
4 acceptable medical source. (AR 22-23).

5 The ALJ found that Plaintiff has the residual functional
6 capacity ("RFC") to perform work at the light exertional level
7 with certain postural limitations. (AR 23). At step four of the
8 sequential evaluation process, the ALJ found that, based on
9 Plaintiff's RFC, he could not perform his past relevant work as a
10 porcelain/enamel painter, a truck driver, a core rip operator and
11 a material handler. (AR 27-28). However, the ALJ determined
12 that, based on Plaintiff's RFC, age, education, and work
13 experience, a finding that Plaintiff is "not disabled" is directed
14 by the Medical-Vocational Guidelines ("Grids") rules 202.21 and
15 202.22. (AR 28). Given Plaintiff's non-exertional limitations,
16 the ALJ relied on the testimony of the vocational expert who
17 testified that an individual with Plaintiff's RFC, age, education,
18 and work experience would be able to perform the requirements of
19 jobs such as cashier II, cleaner/housekeeper and laundry worker.
20 (AR 28-29). Accordingly, based on the testimony of the vocational
21 expert, the ALJ determined at step five of the sequential
22 evaluation process that Plaintiff was not disabled within the
23 meaning of the Social Security Act. (AR 28-29).

24 ISSUES

25 Plaintiff contends that the Commissioner erred as a matter of
26 law. Specifically, he argues that:

27 1. The ALJ erred by finding that Plaintiff does not have
28 severe mental impairments; and

DISCUSSION

Plaintiff has the burden of proving that he has a severe impairment at step two of the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 423(d)(1)(A), 416.912. In order to meet this burden, Plaintiff must furnish medical and other evidence that shows that he has a severe impairment. 20 C.F.R. § 416.912(a). The regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c), provide that an impairment is severe if it significantly limits one's ability to perform basic work activities. An impairment is considered non-severe if it "does not significantly limit your physical or mental ability to do basic work activities." 20 C.F.R. §§ 404.1521, 416.921.

1 Step two is "a de minimis screening device [used] to dispose
2 of groundless claims," *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th
3 Cir. 1996), and an ALJ may find that a claimant lacks a medically
4 severe impairment or combination of impairments only when this
5 conclusion is "clearly established by medical evidence." S.S.R.
6 85-28; see *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir.
7 2005). Applying the normal standard of review to the requirements
8 of step two, the Court must determine whether the ALJ had
9 substantial evidence to find that the medical evidence clearly
10 established that Plaintiff did not have a medically severe mental
11 impairment. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)
12 ("Despite the deference usually accorded to the Secretary's
13 application of regulations, numerous appellate courts have imposed
14 a narrow construction upon the severity regulation applied
15 here."); *Webb*, 433 F.3d at 687.

16 In this case, the ALJ concluded that the records in evidence
17 do not support the Plaintiff's allegations of severe mental
18 impairments and that Plaintiff's subjective complaints were not
19 sufficient to establish a severe mental impairment. (AR 20). The
20 ALJ found that Plaintiff has not had a severe mental impairment
21 since January 31, 2004. (AR 23).

22 On April 11, 2001, over three years before the alleged onset
23 date, Plaintiff underwent a psychological evaluation with Robert
24 E. Schneider, Ph.D. (AR 214-223). Dr. Schneider indicated that
25 the results of the mental status evaluation revealed "no evidence
26 of depression, anxiety nor any significant psychological
27 impairment. [Plaintiff] did not appear to be in significant
28 distress." (AR 217). However, the results of the MMPI-2

1 indicated he was suffering from clinically significant depression
2 and anxiety with diminished psychological energy. (AR 220, 222).
3 Dr. Schneider diagnosed a dysthymic disorder¹ and unresolved grief
4 reaction and ruled out attentional disorder. (AR 223). He gave
5 Plaintiff a global assessment of functioning ("GAF") score of 48.²
6 (AR 223). Dr. Schneider indicated that Plaintiff had never been
7 in psychological treatment and recommended he be referred to
8 either individual psychological counseling or some type of grief
9 group and for appropriate medications. (AR 223).

10 On May 24, 2002, Plaintiff was seen by Lisa Sjodin, M.D., on
11 referral from Social Security Disability Determination Services.
12 (AR 224-230). Dr. Sjodin noted that one year prior Plaintiff was
13 referred to a psychiatric nurse practitioner and prescribed Prozac
14 to manage his depressive symptoms. (AR 224). Plaintiff did not
15 take the Prozac as prescribed. (AR 224). Dr. Sjodin diagnosed an
16 adjustment disorder with depressed mood, mild to moderate, ethanol
17 dependence, in complete, sustained remission and an attention
18 deficit disorder. (AR 229). She gave Plaintiff a GAF score of
19 50. (AR 229). Dr. Sjodin remarked that, although Plaintiff had
20 unresolved grief issues, his depression was mainly part of an
21 adjustment reaction to his situation. (AR 229).

22 On February 26, 2003, Plaintiff was evaluated by licensed
23 clinical psychologist Lawrence H. Moore, Ph.D. (AR 331-332). Dr.

24
25 ¹Dysthymia is defined as a low-grade or milder form of
depression. THE MERCK MANUAL 1593, 1599 (15th ed. 1992).

26 ²A GAF of 50-41 reflects: "[s]erious symptoms (e.g.,
27 suicidal ideation, severe obsessive rituals, frequent
shoplifting) or any serious impairment in social, occupational,
28 or school functioning (e.g., no friends, unable to keep a job)."
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV 32 (4th ed. 1994).

1 Moore indicated that, "[f]rom a psychiatric standpoint, this
2 individual may have mild depressive symptoms related to
3 situational stressors (i.e., unemployment, health concerns,
4 relational problems) and may even suffer from mild, chronic mood
5 difficulties, though there is little evidence to suggest the
6 presence of a clinically significant disorder." (AR 331). Dr.
7 Moore reported no functional impairment. (AR 331).

8 On September 2, 2004, Jay M. Toews, Ed.D. evaluated
9 Plaintiff. (AR 273-276). Plaintiff reported to Dr. Toews that
10 while he gets depressed, he felt his primary problems were
11 physical rather than psychological and that his depression was
12 "less than it was several years ago." (AR 273). Dr. Toews
13 reported that Plaintiff was able to maintain attention and
14 concentration, able to retain multi-step instructions over time,
15 and able to execute routine job-related decisions and judgments.
16 (AR 276). There was no indication Plaintiff would have difficulty
17 relating to co-workers or tolerating supervision or that
18 psychological problems would interfere with his employability.
19 (AR 276). Dr. Toews diagnosed an adjustment disorder with anxiety
20 and depressed mood, mild, ruled out learning disorders, NOS, and
21 an attention deficit disorder, and gave Plaintiff a GAF score of
22 65.³ (AR 276).

23 On September 16, 2004, state agency reviewing psychologist,
24 Mary Gentile, Ph.D., reviewed the record and completed a
25 Psychiatric Review Technique form. (AR 277-291). Dr. Gentile
26

27 ³A GAF of 70-61 is characterized as: "Some mild symptoms
28 or some difficulty in social, occupational, or school
functioning, but generally functioning pretty well." DIAGNOSTIC
AND STATISTICAL MANUAL OF MENTAL DISORDERS 12 (3d ed. Rev. 1987).

1 opined that Plaintiff's impairments were not severe. (AR 277).
2 She indicated that Plaintiff's adjustment disorder with anxiety,
3 depressed mood, mild, and alcohol abuse in questionable remission
4 caused Plaintiff to have no restrictions of activities of daily
5 living, mild difficulties in maintaining social functioning, mild
6 difficulties in maintaining concentration, persistence or pace and
7 no repeated episodes of decompensation. (AR 280, 285, 287).

8 On December 13, 2004, state agency reviewing psychologist,
9 Sharon Underwood, Ph.D., reviewed the record and indicated that
10 Plaintiff's mental impairments continued to appear non-severe.
11 (AR 312, 324). Dr. Underwood's findings were identical to the
12 findings of Dr. Gentile. (AR 312-326).

13 On January 25, 2006, Clark D. Ashworth, Ph.D., examined
14 Plaintiff. (AR 364-371). Dr. Ashworth noted that 2003 counseling
15 notes revealed diagnoses of depressive disorder, NOS, and a
16 personality disorder, NOS, as well as a GAF score of 55 without
17 explanatory narrative. (AR 366). The counseling notes further
18 indicated that Plaintiff was seen again in 2005 and given no
19 diagnoses and a GAF score of 70, corresponding to mild symptoms or
20 some difficulty in functioning but generally doing pretty well
21 with some meaningful relationships. (AR 366). Dr. Ashworth gave
22 rule out diagnoses of a depressive disorder and an anxiety
23 disorder, mild severity, and a personality disorder, NOS, and gave
24 a GAF score of 55.⁴ (AR 370). Dr. Ashworth noted that
25 Plaintiff's "overall functioning appears improved over what I see
26

27 ⁴A GAF of 60-51 reflects: Moderate symptoms or moderate
28 difficulty in social, occupational, or school functioning. See
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (4th ed. 1994).

1 described in records of past evaluations," and that there did not
2 appear to be a great need for psychological treatment other than
3 counseling. (AR 370-371).

4 While the ALJ determined that "since the amended date of
5 disability onset, January 31, 2004, the claimant has not had a
6 severe mental impairment diagnosed by an acceptable medical
7 source" (AR 22), the undersigned finds that the medical record
8 paints an incomplete picture of Plaintiff's overall mental health.
9 Although Plaintiff ultimately bears the burden of establishing his
10 disability, see *Bowen*, 482 U.S. at 146, the ALJ had an affirmative
11 duty to supplement Plaintiff's medical record, to the extent it
12 was incomplete, before rejecting his claim of a severe mental
13 impairment. See 20 C.F.R. § 404.1512(e)(1); S.S.R. 96-5p (1996);
14 *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983) ("In Social
15 Security cases the ALJ has a special duty to fully and fairly
16 develop the record and to assure that the claimant's interests are
17 considered.")

18 The ALJ's duty to supplement Plaintiff's record is triggered
19 by ambiguous evidence. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150
20 (9th Cir. 2001). As outlined above, the mental health records
21 prior to the disability onset date reveal that Plaintiff was
22 suffering from depressive symptoms and anxiety which resulted in
23 mild to serious symptoms or difficulty in functioning. (AR 220-
24 223, 229, 331). After January 31, 2004, the medical records
25 evidence continuing mental problems (AR 276, 280-287, 312-324,
26 370) that possibly are sufficient to pass the de minimis threshold
27 of step two of the sequential evaluation process. See, *Smolen*, 80
28 F.3d at 1290.

1 An ALJ may find that a claimant lacks a medically severe
2 impairment or combination of impairments only when this conclusion
3 is "clearly established by medical evidence." S.S.R. 85-28; *Webb*,
4 433 F.3d at 686-687. Here, the medical evidence was sufficiently
5 ambiguous with regard to Plaintiff's mental impairments to trigger
6 the ALJ's duty to fully and fairly develop the record. Based on
7 the foregoing, the matter shall be remanded to further develop the
8 record and to make a new determination at step two of the
9 sequential evaluation process with respect to Plaintiff's mental
10 impairments.

11 CONCLUSION

12 The Court has the discretion to remand the case for
13 additional evidence and finding or to award benefits. *Smolen*, 80
14 F.3d at 1292. Remand is appropriate when additional
15 administrative proceedings could remedy defects. *Rodriguez v.*
16 *Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). It is not clear from
17 the record whether Plaintiff's mental impairments after the
18 disability onset date are "severe" as defined by the Social
19 Security Act. On remand the ALJ shall further develop the record
20 by ordering a consultative mental health examination to clarify
21 Plaintiff's mental health problems. The ALJ shall thereafter
22 conduct a new step two analysis, taking into consideration the
23 consultative examination as well as all other credible evidence of
24 record.

25 After making a new determination at step two, the ALJ will
26 need to continue with the sequential evaluation process, including
27 determining at step three if the severity of any of Plaintiff's
28 impairments, either singly or in combination, meet or equal a

1 Listings impairment. The ALJ shall thereafter reevaluate
2 Plaintiff's residual functional capacity and ability to perform
3 other work, at step five of the sequential evaluation process,
4 obtaining additional vocational expert testimony if necessary.

5 **IT IS ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 18**) is
7 **GRANTED.**

8 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 22**) is
9 **DENIED.**

10 3. The above captioned matter is **REMANDED** for additional
11 proceedings as outlined above and pursuant to sentence four of 42
12 U.S.C. § 405(g).

13 4. Judgment shall be entered for **PLAINTIFF.**

14 5. An application for attorney fees may be filed by
15 separate motion.

16 6. The District Court Executive is directed to enter this
17 Order, provide a copies to counsel, and **CLOSE** the file.

18 **IT IS SO ORDERED.**

19 **DATED** this 30th day of April, 2008.

20
21 S/James P. Hutton
22 JAMES P. HUTTON
23 UNITED STATES MAGISTRATE JUDGE
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